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12
13 **UNITED STATES DISTRICT COURT**
14 **NORTHERN DISTRICT OF CALIFORNIA**

15 MARTA GREENBERG, an individual,
16 JOHN JUDGE, an individual,
17 KAREN MANDEL, an individual,
18 ANDREW MONROE, an individual, and
19 KATIE VAN CLEAVE an individual;

18 Plaintiffs,

19 v.

20 DIGITAL MEDIA SOLUTIONS LLC, a
21 Delaware limited liability company, BILCO
22 MEDIA INC., a business entity of unknown
23 organization, ALLAN HUGHES, an individual,
24 and DOES 1-100,

23 Defendants.

Case No.: 3:19-cv-00355

**DEFENDANT DIGITAL MEDIA
SOLUTIONS, LLC'S NOTICE OF
MOTION AND MOTION TO DISMISS**

Not yet assigned to a Judge

Date: To be determined
Time: To be determined
Courtroom: To be determined

1 TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on a date to be determined by the Court once the case is
3 assigned to a Judge and in a location also to be determined by the assigned Judge, Defendant
4 Digital Media Solutions, LLC will and hereby does move, pursuant to Federal Rule of Civil
5 Procedure 12(b)(6), to dismiss the Complaint of plaintiffs Marta Greenberg, John Judge, Karen
6 Mandel, Andrew Monroe, and Katie Van Cleave for violations of California Business and
7 Professional Code § 17529.5. The Motion is made on the grounds that the Complaint fails to state
8 a claim upon which relief may be granted.

9 This Motion to Dismiss will be based upon this Notice of Motion, the attached
10 Memorandum of Points and Authorities, the record, pleadings, and papers on file herein, and upon
11 such other further evidence as may be presented at the time of the hearing.

12
13 Dated: January 29, 2019

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

14
15 By

/s/ Jay T. Ramsey

JAY T. RAMSEY

16 KLEIN MOYNIHAN TURCO LLP
17 Neil Asnen (*pro hac vice* to be filed)

18 Attorneys for Defendants
19 DIGITAL MEDIA SOLUTIONS LLC
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1 **I. INTRODUCTION**

2 In their Complaint, Plaintiffs raise claims against defendant Digital Media Solutions, LLC
 3 (“DMS”) for violation of Cal. Bus. & Pro. Code § 17529.5 (“17529.5”). The claims ignore
 4 precedential case law that governs the proper application of the statute. Specifically, Plaintiffs
 5 rely exclusively on *Balsam v. Trancos*, 203 Ca. App. 4th 1083 (2012). However, the California
 6 Court of Appeal’s subsequent decision in *Rosolowski v. Guthy-Renker*, 230 Cal. App. 4th 1403
 7 (2014) explicitly distinguished *Balsam* and provided guidance governing the analysis of Plaintiffs’
 8 claims under 17529.5. In the years following the *Rosolowski* decision, courts have routinely
 9 eschewed the inappropriately narrow 17529.5-related analysis espoused by *Balsam* in favor of the
 10 more suitable fulsome analysis adopted in *Rosolowski*. Under the proper *Rosolowski* standard,
 11 Plaintiffs have not stated a valid claim for relief 5. Likewise, given the regulations contained
 12 within the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003
 13 (“CAN-SPAM Act”), 15 U.S.C. §§ 7701, *et seq.*, Plaintiffs also fail to set forth sufficient
 14 allegations to avoid express preemption by federal law. As a result, DMS is entitled to dismissal
 15 of Plaintiffs’ claims against it.

16 Plaintiffs allege that they received unsolicited emails that were sent by one or more of the
 17 co-defendants and which advertised DMS’s website and/or its products and services. *Compl.* ¶ 15,
 18 27. They claim that these emails violated Cal. Bus. & Pro. Code § 17529.5 because the headers of
 19 such emails allegedly contain generic names in the “From” field which allegedly misrepresent
 20 from whom the emails were sent, that they were sent from allegedly untraceable domain names,
 21 and that they contain subject lines which violate the statute. Nevertheless, Plaintiffs’ claims
 22 amount to nothing more than technical allegations concerning what was included in the emails’
 23 headers. This is precisely what the CAN-SPAM Act regulates. In the absence of factual
 24 allegations that the emails contained materially false or deceptive information, the claims are
 25 expressly preempted by the federal CAN-SPAM Act. Plaintiffs’ conclusory assertion of falsity
 26 and deception, *Compl.* ¶ 15 are insufficient to save the claims from preemption given the
 27 substance of the factual allegations themselves.

1 The *Rosolowski* decision, referenced above and discussed in further detail below, sets forth
2 the standard by which emails may be found to misrepresent information for purposes of 17529.5.
3 *Rosolowski* stands for the proposition that when the identity of senders and/or advertisers can be
4 ascertained upon a fulsome examination of the body of the email (inclusive of any hyperlink to the
5 sender or advertiser's email included therein, an unsubscribe link and any physical mailing address
6 likewise included in the body of the email) the email does not contain falsified or misrepresented
7 header information. This extends to an email's use of generic from names and/or allegedly
8 untraceable domains. *See generally Rosolowski*. Here, the exemplar email included by Plaintiffs
9 in the Complaint exhibits that the identity of DMS was neither falsified nor misrepresented, nor
10 was it deceptively concealed because all of the required information to identify DMS was included
11 in the body of the email: the link to a DMS-Internet property website, a physical mailing address
12 and an unsubscribe link. Plaintiffs' claims concerning the header information, therefore, fail to
13 satisfy the *Rosolowski* standard and must be dismissed.

14 Plaintiffs' claims concerning the subject lines of the emails at issue likewise fail to satisfy
15 the standard set forth *Rosolowski*. Similar to the standard it adopted with respect to header
16 information, *Rosolowski* held that an email's subject line is appropriately viewed in conjunction
17 with the body of the email, rather than in isolation, in analyzing 17529.5 claims that the subject
18 lines are likely to deceive. *Rosolowski*, 230 Cal. App. 4th 568. Again, the Complaint itself
19 indicates that the subject lines do not violate the statute under *Rosolowski*. The body of the
20 exemplar email, which concerned the availability of warranty options, is consistent with the
21 subject lines of the emails as identified by Plaintiffs (*see Compl.* ¶ 51) and demonstrate that no
22 recipient acting reasonably under the circumstances would likely be deceived thereby. As such,
23 no violation of 17529.5 may lie.

24 For the foregoing reasons, as described in further detail below, DMS respectfully requests
25 that the claims against it be dismissed in accordance with Fed. R. Civ. P. 12(b)(6).
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1 **II. STANDARD OF REVIEW**

2 Fed. R. Civ. P. 12(b)(6) allows the Court to dismiss the subject claims brought by Plaintiffs
 3 for alleged violations of Cal. Bus. & Pro. Code § 17529.5 for their failure to state a claim upon
 4 which relief may be granted. Under this standard, grounds for dismissal may either be “the lack of
 5 a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal
 6 theory.” *Balistreri v. Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir. 1990).

7 **III. ARGUMENT**

8 **A. The Federal CAN-SPAM Act Preempts Plaintiffs’ Claims for Violation of Cal.**
 9 **Bus. & Pro. Code § 17529.5(a)(2)**

10 Plaintiffs’ claims for violation of Cal. Bus. & Pro. Code 17529.5(a)(2) are subject to
 11 dismissal because they are expressly preempted by the Controlling the Assault of Non-Solicited
 12 Pornography and Marketing Act of 2003 (“CAN-SPAM Act”), 15 U.S.C. §§ 7701, *et seq.*
 13 Generally, the CAN-SPAM Act, regulates the transmission of unsolicited commercial email by
 14 prohibiting sending messages with “deceptive subject headings” or “header information that is
 15 materially false or materially misleading.” *Hypertouch, Inc. v. ValueClick, Inc.*, 192 Cal. App.
 16 4th 805, 823 (2011). One of the primary goals of the CAN-SPAM Act was to implement one
 17 national standard concerning the content of commercial email. *Id.* at 27. To accomplish that goal,
 18 the CAN-SPAM Act includes the following express preemption provision:

19 (1) In general. This chapter supersedes any statute, regulation, or
 20 rule of a State or political subdivision of a State that expressly
 21 regulates the use of electronic mail to send commercial messages,
 22 except to the extent that any such statute, regulation, or rule
 prohibits falsity or deception in any portion of a commercial
 electronic mail messages or information attached thereto.

23 (2) State law not specific to electronic mail. This chapter shall not
 be construed to preempt the applicability of –

24 (A) State laws that are not specific to electronic mail,
 25 including State trespass, contract, or tort law; or

26 (B) other State laws to the extent that those laws relate to
 27 acts of fraud or computer crime.
 28

Here, Plaintiffs' claims for violation of Cal. Bus. & Pro. Code § 17529.5(a)(2) are expressly preempted by the CAN-SPAM Act because they seek to challenge the email's use of particular names used "from" field and domain names included in the of the subject commercial emails' headers, which Plaintiffs argue misrepresent who the emails are from. To be sure, however, the Ninth Circuit court has previously held that "technical allegations regarding header information find no basis in traditional tort theories and therefore fall beyond the ambit of the exception language in the CAN-SPAM Act's express preemption clause." *Gordon v. Virtumundo, Inc.*, 575 F.3d 1040, 106 (9th Cir. 2009).

Plaintiffs attempt to avoid preemption by alleging in conclusory fashion that "a From Name that misrepresents who a spam is from is *not* a mere technical error; rather, it is a material misrepresentation of the most important part of the email header." *Compl.* ¶ 37. However, case law has decisively held to the contrary. The Ninth Circuit has ruled that allegations concerning what must be included in the "from" field of a commercial email is precisely the type of content or labeling requirement that is "clearly subject to preemption." *Gordon*, 575 F.3d at 1064. In fact, Plaintiffs' complaint makes clear that the nature of the claims are not that the names in the "From" field are materially false or deceptive, but rather that they are merely generic. *Compl.* ¶ 37. Nevertheless, the California Court of Appeal addressed the propriety of generic names in the "From" field in *Rosolowski v. Guthy-Renker LLC*, 230 Cal. App. 4th 1403, finding such generic From names to be perfectly acceptable when the bodies of email contain adequate identifying information. Plaintiffs' allegation at paragraph 39 of the Complaint that "truthful information in the body . . . does not cure misrepresented information contained in or accompanying the headers" has been flatly rejected by *Rosolowski*. Accordingly, at best, Plaintiffs' claims amount to nothing more than an argument that the headers contain deficiencies consisting of non-deceptive statements as opposed to material falsity or deception, and thus are expressly preempted by CAN-SPAM.

Importantly, Plaintiffs do not claim that the names in the "From" field or the domain names are materially falsified or deceptive insofar as, for example, the names in the "from" field

1 are not alleged to be persons known to the Plaintiffs and the senders of the subject emails spoofed
2 the names, as has been held to be materially deceptive in *Hoang v. Reunion.com, Inc.*, 2010 U.S.
3 Dist. LEXIS 34466 (N.D. Cal. Mar. 31, 2010). To the contrary, the Plaintiff's allegations are
4 analogous to those presented to the Ninth Circuit in *Gordon*, which were ultimately deemed to be
5 claims for incomplete or less than comprehensive information regarding the identity of the email's
6 sender, despite that plaintiff's protestations that the emails violated 17529.5 because they
7 misrepresented or obscured the identity of the seller. *Gordon*. 575 F.3d at 1064. As a result, the
8 Court should reach the same conclusion reached in *Gordon*, the 17529.5(a)(2) claims are
9 preempted by the CAN-SPAM Act.

10 Plaintiffs' claims concerning the domain names of the subject emails fare no better in
11 escaping preemption given the *Rosolowski* decision and because they likewise amount to
12 complaints of incomplete or less than comprehensive information regarding the identity of the
13 sender. The Complaint bears out that Plaintiff's claims are simply that "Plaintiffs could not
14 identify PLATINUM's Marketing partner by querying the Whois database." *Compl.* ¶ 47. This is
15 insufficient to state a claim that there is material falsity or deception. Moreover, *Rosolowski*
16 subsequently found that "[i]rrespective of the allegedly untraceable domain names herein, the
17 identity of the sender was readily ascertainable from the body of the emails; therefore, Plaintiffs
18 failed to state a cause of action against Guthy for misrepresented header information under Section
19 17529.5, subdivision (a)(2)." *Id.* at 1414-15. Given both the absence of allegations of material
20 falsity and deception concerning the domain names, and the ability of recipients to identify DMS
21 from the body of the email, the Court should find that these claims are preempted and subject to
22 dismissal.

23 The Court also should not entertain any argument by Plaintiffs that the emails are
24 deceptive because the Plaintiffs were required to open them in order to determine the identity of
25 the senders. *Compl.* ¶ 42. This argument has also been flatly rejected by the courts. *See*
26 *Rosolowski*, 230 Cal. App. 4th at 1407; *see also Silverstein v. Keynetics, Inc.* 192 F. Supp. 3d
27 1045, 1052 (2016); *Wagner v. Spirer Vision LLC*, 2015 U.S. Dist. LEXIS 24258, *18 (N.D. Cal.
28

Feb. 27 2015). It has been well established that where the sender or advertiser of an email can be determined from an email header or the body of an email, the emails are not materially false or deceptive for purposes of avoiding CAN-SPAM preemption. *Silverstein*, 192 F. Supp. 3d at 1052; *Gordon*, 575 F.3d at 1063. As demonstrated below, not only does the emails' identification of Defendant in the body thereof ultimately require a finding that no violation of 17529.5 may be found, but the fact that such identification may be established in the body of the email likewise demonstrates that there is no material falsity or deception present to avoid preemption.

B. Plaintiffs Do Not Allege a Violation of Cal. Bus. & Pro. Code § 17529.5

Rosolowski decisively held that "a header line does not misrepresent the identity of the sender merely because it does not identify the name of the entity which sent the e-mail or merely because it does not identify an entity whose domain name is traceable from an online database, provided the sender's identity is readily ascertainable from the body of the e-mail." *Rosolowski*, 230 Cal. App. 4th at 1407. While Plaintiffs rely on the holding in *Balsam* as it relates to the allegations that the headers of the subject emails contain false and untraceable domain names, the *Balsam* "court based its ruling on the fact that the sender deliberately used untraceable domain names . . ." but "express[ed] no judgment about other circumstances in which . . . the presence of other information identifying the sender in the body of the e-mail could affect liability under the statute." *Balsam*, 203 Cal. App. at 1101 n.17. Nevertheless, the court in *Rosolowski v. Guthy-Renker LLC*, 230 Cal. App. 4th 1403 (2014), addressed emails from which the domain name could not be traced. There, the court examined the bodies of the emails, finding that "[i]rrespective of the allegedly untraceable domain names herein, the identity of the sender was readily ascertainable from the body of the emails; therefore, Plaintiffs failed to state a cause of action against Guthy for misrepresented header information under Section 17529.5, subdivision (a)(2)." *Id.* at 1414-15.

The alleged facts presented to the court in *Rosolowski* are analogous to those alleged in Plaintiffs' complaint: the domain names could not be traced to the emails' sender; the domain names did not include the names of existing companies or persons; the domains from which the emails originated were not traceable to the defendant; and a WHOIS search would not identify the

1 defendant as the registrant of the domains from which the emails originated. However, the
2 *Rosolowski* court ultimately found that no claim for violation of 17529.5(a)(2) could be sustained
3 because the emails “provided a hyperlink to the sender’s website, and provided an unsubscribe
4 notice as well as a physical address.” *Id.* at 1416. So too here.

5 Plaintiffs include an exemplar email, which is alleged to be a representative sample of
6 those emails at issue. *Compl.* ¶ 1. Plaintiffs allege that clicking the link in the email “immediately
7 redirects through several URLs before landing at PLATINUM’s website
8 platinumautowarranty.com.” The email clearly indicates that a physical address is included, and
9 that an unsubscribe link is also included. Accordingly, by the Complaint’s own admissions, the
10 subject emails comply with the requirements set forth in *Rosolowski*. Plaintiffs go to great lengths
11 in their pleading to submit legal argument, rather than factual allegations, for the purpose of
12 putting before the Court their belief for why *Rosolowski* is “illogical, irrelevant, and inapplicable”
13 while *Balsam v. Trancos*, 203 Cal. App. 4th 1083 (1st Dist. 2012), a case both predating and
14 expressly distinguished by *Rosolowski*, is the proper authority to govern their claims. However,
15 in so inappropriately submitting such legal argument as part of their Complaint, Plaintiffs simply
16 ignore the extensive body of case law, both in California state court and the federal district courts,
17 which has upheld and applied the holding of *Rosolowski*, to the exclusion of *Balsam*, in order to
18 dismiss claims identical to those alleged by Plaintiffs. *See e.g., Silverstein v. Keynetics, Inc.*, 192
19 F. Supp. 3d 1045 (N.D. Cal. 2016); *Wagner v. Spire Vision LLC*, 2015 U.S. Dist. LEXIS 24258
20 (N.D. Cal. 2015).

21 The *Rosolowski* standard applies to the subject emails. Given that Defendant’s identity
22 could be, and was, readily ascertained from the body of the emails, as demonstrated by the
23 exemplar provided by Plaintiffs (ie. hyperlink to a DMS Internet property website, an unsubscribe
24 link and a mailing address), the emails were not materially falsified or misrepresented. As a
25 result, Plaintiffs fail to state a claim for which relief may be granted with respect to allegations that
26 the subject emails violated 17529.5(a)(2) by virtue of the subject emails’ headers.

1 Finally, Plaintiff further alleges violation of 17529.5(a)(2) resulting from the emails’
 2 subject lines. Notwithstanding the attempt to conclusorily allege that subject lines may give rise
 3 to a violation of 17529.5(a)(2), it is 17529.5(a)(3) that explicitly governs subject lines. The
 4 California Supreme Court has provided the roadmap on this point. In *Kleffman v. Vonage*
 5 *Holdings Corp.*, 49 Cal. 4th 334, 340 (2010), the Court defined header information as “the source,
 6 destination, and routing information attached to an electronic mail message, including the original
 7 electronic mail address, and any other information that appears in the line identifying, or
 8 purporting to identify, a person initiating the message.” It continued by identifying 17529.5(a)(3)
 9 as the subsection that “fully articulat[es] the standard applicable to e-mail subject lines.” *Kleffman*,
 10 49 Cal. 4th at 343. Plaintiffs’ claims that “every . . . court that cites *Kleffman* (and its progeny) for
 11 the proposition that Subject Lines are not part of email headers is incorrect” demonstrates a
 12 wanton disregard for precedential jurisprudence. This Court is bound by California’s highest
 13 court’s interpretation of California state law and is not free to disregard it as Plaintiffs would
 14 insinuate.

15 *Rosolowski*’s analysis of claims made with respect to subject lines is again both instructive
 16 and provides the necessary guidance to analyze the propriety of the Plaintiffs’ subject line-related
 17 claims. In *Rosolowski*, the court rejected the notion that an e-mail’s subject line must be viewed in
 18 isolation, rather than in conjunction with the body of the email for the purposes of analyzing a
 19 violation of 17529.5. *Rosolowski*, 230 Cal. App. 4th at 568. That standard of 17529.5(a)(3),
 20 however, is plainly not implicated by the emails at issue. The subject lines are not likely to
 21 mislead a recipient acting reasonably under the circumstances.

22 Here, the exemplar email demonstrates that the subject lines identified by Plaintiffs:
 23 “[name or email address] please confirm your extended warranty plan,” “[name or email address],
 24 Confirm your Auto Warranty Plan Extension,” “Your Auto Warranty is Running Out!,” and/or
 25 “Attention [name], Your Auto Warranty is Running Out!”, are unlikely to mislead a recipient
 26 acting reasonably under the circumstances. Plaintiffs allege that these subject lines make
 27 reference to a preexisting relationship, but no such reference is made in any of the subject lines
 28

1 cited by Plaintiffs. Subject lines found to be violative of 17529.5 in the past have been those that
 2 suggest that the recipient can obtain something for free doing a particular task. *See Hypertouch,*
 3 *Inc. v. ValueClick, Inc.*, 192 Cal. App. 4h 805 (2nd Dist. 2011). That is not the case with the
 4 subject lines at issue. Here, the body of the email advertisements make clear not that an extended
 5 warranty can be obtained by performing a single task, like the emails in *Hypertouch*, but rather
 6 that warranty options were available for viewing upon visiting a separate website. Given that
 7 *Rosolowski* has rejected Plaintiffs' attempts to view the subject lines in isolation, it is impossible
 8 to find that a recipient acting reasonable under the circumstances would be likely to be misled
 9 when those subject lines are viewed in conjunction with the emails' body. Because the subject
 10 lines comply with the standard set forth in *Rosolowski*, there is no claim that they violate 17529.5
 11 and Plaintiffs' claims for such must be dismissed.

12 **IV. CONCLUSION**

13 Plaintiffs' Complaint fails to plead a valid claim against DMS for violation of Bus. & Pro.
 14 Code §17529.5. Furthermore, the claims as alleged are preempted by the CAN-SPAM Act.
 15 Based on the foregoing, the Complaint should be dismissed against DMS.

16 Dated: January 29, 2019

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

17 By

/s/ Jay T. Ramsey

JAY T. RAMSEY

19 KLEIN MOYNIHAN TURCO LLP

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